

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division**

**JOSEPH R. ERNST,**

**Plaintiff,**

**v.**

**CIVIL NO. 3:11-cv-625**

**EXPERIAN INFORMATION SOLUTIONS, INC.,  
TRANS UNION, LLC, WACHOVIA MORTGAGE,  
a Division of WELLS FARGO BANK, N.A.,**

**Defendants.**

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR  
ENTRY OF AN ORDER TO SEAL AFFIDAVIT**

COMES NOW the Plaintiff, by counsel, and for his Memorandum in Opposition to Defendant's Motion for Leave to File Under Seal, he states as follows:

**BACKGROUND**

This is an action brought under the Federal Fair Credit Reporting Act (FCRA), 15 U.S.C. §1681s-2(b). The Plaintiff, a consumer, has alleged that Defendant Wells Fargo failed to lawfully investigate his numerous disputes of an identity theft account made through the credit reporting agencies.

After filing a Motion to Compel, Defendant asked Plaintiff's counsel for leave to file a belated response to Plaintiff's Motion to Compel through February 27, 2011. Plaintiff's counsel consented to the enlargement. Then, late the evening of the deadline, Defendant filed its response and contemporaneously also filed a Motion to Seal the affidavit of Van Beck, the in-house litigation attorney who is overseeing the defense in the case.

That affidavit is offered without any basis to believe it is confidential. Defendant's Motion to Seal also included not one single fact to support an argument that the affidavit is confidential under the law governing motions to seal. Plaintiff opposes this non-rules based motion.

#### ARGUMENT

Defendant does not attempt to follow the Federal Rules of Civil Procedure or governing law. It cannot possibly meet the very steep burden necessary to obtain leave to file a document under seal. Remarkably, it does not even attempt the effort. First, Defendant did not properly file a motion seeking leave to file a sealed document, making it procedurally difficult to respond and rule on whether leave should be granted to file a sealed document. However, that impediment is easily cured. Yet, it still has not presented the court with any justification for entering an extraordinary order to seal a document.

As the Federal Rules 5.2(f)-(g) and Local Rule 5(C) contemplate, the standard for the Court to withhold otherwise available information from the public is very high, whether by Protective Order or by Seal. *Ashcroft v. Conoco, Inc.*, 218 F. 3d 288 (4<sup>th</sup> Cir. 2000) (holding that failure to follow the requirements and to make the showing to justify sealing records precludes such an order); *Stone v. Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 178 (4<sup>th</sup> Cir. 1988) (reasoning that "[t]he public's right of access to judicial records and documents may be abrogated only in unusual circumstances"); *In re Knight Publishing Co.*, 743 F.2d 231 (4<sup>th</sup> Cir. 1984) (holding that while a district court "has supervisory power over its own records and may, in its discretion, seal documents if the public's right of access is outweighed by competing interests, the 'presumption' in such cases favors public access.") As the Fourth Circuit held in *Ashcroft*:

Accordingly, before a district court may seal any court documents, we held that it

must (1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives. *See Knight*, 743 F.2d at 235- 36; *see also Stone*, 855 F.2d at 181. These procedures "must be followed when a district court seals judicial records or documents." *Stone*, 855 F.2d at 179-80, 182.

*Ashcroft*, 218 F. 3d at 302.

Defendant entirely fails to satisfy these threshold requirements. In particular, it does not offer any specific reason or offer any factual basis to find that sealing the suggested affidavit is necessary to avoid some harm. And, of course, it would not have such a basis. The affidavit is that of a mere litigation attorney seeking to avoid revealing Wells Fargo's strategy for confronting lawsuits alleging the Bank's misconduct, which is not a legitimate basis for the court to order the document to be sealed. Further, even if it somehow was a valid reason, the "facts" claimed in the affidavit are nearly identical to those served in responses to Plaintiff's Interrogatories and inappropriately labeled as confidential, to which the Plaintiff objected under the terms of the stipulated protective order.

Accordingly, because the Defendant has failed to comply with the rules of the court, the case law or otherwise provide any cognizable support for its motion to seal, the Defendant's Motion for Leave to File Under Seal should be denied.

Respectfully,

**JOSEPH R. ERNST**

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/s/  
Leonard A. Bennett, Esq.  
VSB #37523  
Attorney for Plaintiff  
CONSUMER LITIGATION ASSOCIATES, P.C.

763 J. Clyde Morris Boulevard, Suite 1-A  
Newport News, Virginia 23601  
(757) 930-3660 - Telephone  
(757) 930-3662 – Facsimile  
[lenbennett@cox.net](mailto:lenbennett@cox.net)

Susan M. Rotkis  
VSB #40693  
Attorney for Plaintiff  
CONSUMER LITIGATION ASSOC., P.C.  
763 J. Clyde Morris Boulevard, Suite 1-A  
Newport News, Virginia 23601  
(757) 930-3660 - Telephone  
(757) 930-3662 – Facsimile  
[srotkis@clalegal.com](mailto:srotkis@clalegal.com)

Kristi Cahoon Kelly, VSB #72791  
SUROVELL ISAACS PETERSEN &  
LEVY PLC  
4010 University Drive, 2nd Floor  
Fairfax, VA 22030  
Telephone (703) 277-9774  
Facsimile (703) 591-9285  
[kkelly@siplfirm.com](mailto:kkelly@siplfirm.com)

*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of February, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Hunter Wilmer Sims , Jr.  
Kaufman & Canoles PC  
150 W Main St  
PO Box 3037  
Norfolk, VA 23510  
Email: [hwsims@kaufcan.com](mailto:hwsims@kaufcan.com)

Terry Catherine Frank  
Kaufman & Canoles PC (Richmond)  
1021 E Cary St Suite 1400

Two James Center  
PO Box 27828  
Richmond, VA 23261  
Email: [tcfrank@kaufcan.com](mailto:tcfrank@kaufcan.com)

*Attorneys for Wachovia Mortgage, a division  
of Wells Fargo Bank, N.A.*

/s/  
Leonard A. Bennett, Esq.  
VSB #37523  
Attorney for Plaintiff  
CONSUMER LITIGATION ASSOCIATES, P.C.  
763 J. Clyde Morris Boulevard, Suite 1-A  
Newport News, Virginia 23601  
(757) 930-3660 - Telephone  
(757) 930-3662 – Facsimile  
[lenbennett@cox.net](mailto:lenbennett@cox.net)